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[illegible] SECRETARY OF LABOR

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[illegible]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEES IN [illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-878

THE NATIONAL LEAGUE OF CITIES, ET AL., APPELLANTS

v.

W. J. USERY, JR., SECRETARY OF LABOR

No. 74-879

THE STATE OF CALIFORNIA, APPELLANT

v.

W. J. USERY, JR., SECRETARY OF LABOR

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE ON REARGUMENT

We are filing this supplemental brief on reargument to amplify two points made in our original brief: (1) that the 1974 Amendments to the Fair Labor Standards Act should not be invalidated because of concern that, if this application of the commerce power to state employees is upheld, the way is open to sweeping federal interference with state sovereignty; and (2) that the impact of the 1974 Amendments upon the states is not nearly as great as the states suggest. We also argue that this Court's recent decision in ***Fry* v. *United States,*** 421 U.S. 542, supports the constitutionality of the 1974 Amendments.

1. a. The two dissenters in ***Maryland* v. *Wirtz,*** 392 U.S. 183, were of the opinion that if the commerce power could be extended to reach "employees of state-owned enterprises" (*id.* at 201), the consequences would be to "disrupt the fiscal policy of the States and threaten their autonomy in the regulation of health and education" and to "overwhelm state fiscal policy" (*id.* at 203). They questioned whether "[i]f constitutional principles of federalism raise no limits to the commerce power where regulation of state activities are concerned, could Congress compel the States to build superhighways crisscrossing their territory in order to accommodate interstate vehicles, to provide inns and eating places for interstate travelers, to quadruple their police forces in order to prevent commerce-crippling riots, etc.? Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] * * * on commercial intercourse.' ?" (*id.* at 204–205), and concluded that

> [i]f all this can be done, then the National Government could devour the essentials of state sovereignty though that sovereignty is attested by the Tenth Amendment. [*Id.* at 205.]

The same kind of argument, based upon the fear of a possible unlimited extension of federal authority into the areas theretofore considered the exclusive province of the states, could also have been made in the many cases in which this Court has upheld federal legislation under the commerce power that reaches into or preempts a subject which, were it not for such legislation, would be a matter for state control. Indeed, as we show below, the federal statutes involved in those cases created a more significant "interfere[nce] with sovereign state functions" than the application to state and local government employees of the Fair Labor Standards Act requirements involved in this case. In none of those cases, however, did the Court invalidate the application to the state of the exercise of the commerce power because of the theoretical possibility that, if such exercise were sustained, it could lead to federal usurpation of the states' traditional exercise of their police powers.

Yet that argument could have been made in each of those cases, for if the commerce power may apply to or oust state regulation in significant aspects of such areas as labor relations, safety and health standards, commercial requirements and the many other subjects which have been held governed or preempted by federal law, there would be no logical reason why the federal government itself could not set all the standards to be followed in those areas. Many years ago, Mr. Justice Holmes, speaking for the Court in *Noble State Bank* v. *Haskell,* 219 U.S. 104, 110, warned against "pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights." Mr. Justice Cardozo expressed the same thought when he referred to "[t]he tendency of a principle to expand itself to the limit of its logic" (Cardozo, *The Nature of the Judicial Process*, p. 51 (1921)).

b. This Court has upheld various federal statutes, enacted in the exercise of the commerce power, that reach into local areas that traditionally have been viewed as the province of the states or preempt the states from exercising their traditional regulatory authority. In those cases, because the states' policy choices affecting the people they govern would no longer prevail, the "interference" with state sovereignty resulting from the application of the federal statutes was far more penetrating than the relatively mild impact of the requirements in the 1974 Amendments that the states apply the same minimum labor standards for their employees that most private employers provide (which does not displace any particular state choice of government policy). It is the former category of cases, not the latter, that directly affects the *raison d'étre* of state governmental institutions.

For example, 60 years ago the Court upheld federal regulation of intrastate rail rates which was designed to eliminate discrimination against interstate commerce. *Houston, E. & W. Texas Ry. Co.* v. *United States*, 234 U.S. 342. In *Wickard* v. *Filburn*, 317 U.S. 111, the Court sustained the application of the commerce power to regulate the production of grain by an individual farmer that was intended wholly for consumption on the farm. Cf. *United States* v. *Darby*, 312 U.S. 100; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. More recently, in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, and *Katzenbach* v. *McClung*, 379 U.S. 294, the Court held that the commerce power extends to the regulation of such traditionally local matters as the operations of a motel and a restaurant.

The states cannot exercise their traditional authority in the labor field to regulate picketing and other aspects of labor-management relations if the conduct sought to be regulated is arguably subject to the National Labor Relations Act. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236; *Garner* v. *Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485; *Amalgamated Association of Street, Etc., Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 383. In another "field which the States have traditionally occupied"—the regulation of grain warehouses—the United States Warehouse Act ousts the states of their regulatory authority. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. Similarly, the Federal Tobacco Inspection Act was held to preempt a Georgia statute requiring that a particular type of tobacco be identified. *Campbell* v. *Hussey*, 368 U.S. 297.

A state's authority to require aliens within its borders to register was invalidated as conflicting with the federal regulatory scheme for aliens. *Hines* v. *Davidowitz*, 312 U.S. 52. Although "[c]ontrol of noise is of course deep-seated in the police power of States," an attempt by a city to place a nighttime curfew on jet flights from its airport was invalidated because the subject matter was preempted by the Federal Aviation Act. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638.

The foregoing cases are, of course, merely illustrative and not exhaustive. Many more could be cited. The point is simply that a valid exercise of the commerce power is not to be rejected merely because it subjects to federal standards areas that the states traditionally have controlled. The principle fully applies to this case.

2. a. Appellants assert that compliance with the 1974 Amendments would impose "enormous costs" which would "destroy the fiscal integrity" and "entire fiscal foundation" of the state and local governments (N.L. Br., pp. 33, 37; Cal. Br., p. 8).[1] Appellants estimate, for example, that the Amendments will cost California $34.5 million annually, of which $23.6 million would relate to fire protection activities (Cal. Br., p. 14, n. 10), and that the nationwide cost increase for fire protection activities will be $200 million (N.L. Br., pp. 10–11). These estimates, as detailed in our original brief (pp. 44–53), are largely unsupported by any underlying facts[2] and are based largely on a misconception of the Act's requirements.

In any event, the additional costs of complying with the Amendments that appellants project, when considered in light of the total expenses of state and local governments (approximately $236 billion)[3], would not, as appellants fear, "destroy the [States'] * * * entire fiscal foundation." The alleged additional costs for fire protection activities of $200 million, for example, would be less than one percent of the state and local governments' total expenditures. Although the additional costs may require state and local governments to curtail certain activities or to raise additional revenue,[4] those costs would constitute only a small part of the total expenses of those activities. In any event, similar pressures on existing service levels will arise from the general increases in labor costs mandated by collective bargaining agreements or legislative enactments, higher interest rates payable on the public debt, and the recent overall rise in the cost of government.

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[1] Although the fiscal burden imposed on states by congressional action under the commerce power typically raises only "questions of policy" and not constitutional issues (see our original brief, pp. 45–46), we assume that a federal statute would be unconstitutional if the fiscal burden it imposed was so substantial that it obliterated federalism and state sovereignty. See our original brief, pp. 40–41.

[2] The difficulty in assessing the accuracy of appellants' cost figures is illustrated by California's estimate of the cost impact of the Amendments on its Ecology Corps. According to California, this would be $1 million and, as a result, California has reduced its Ecology Corps centers from eight to five (Cal. Br., pp. 18–19). The $1 million cost estimate is based on the stated assumption that Corps employees are paid 75 cents an hour, which is incorrect since they are paid differing rates depending on their work assignment, ranging up to $2.80 per hour for firefighting activities (*Review of the California Ecology Corps*, Committee on Efficiency and Cost Control of the California Assembly, 1972, pp. 10–13).That estimate further assumes that no credit can be taken for the cost of room and board (which, as indicated in our original brief, p. 48, is not correct). Moreover, an entry in the *1975–76 Governor's Budget Summary* indicates that three Ecology Corps centers will be converted "to provide facilities for a greater number of inmates from the State Department of Corrections" (*Summary*, p. A–24)—which suggests a reason other than the 1974 Amendments for the loss of the three centers.

[3] Executive Office of the President, Office of Management and Budget, *Special Analyses, Budget of the United States Government*, pp. 203, 205 (Washington, D.C. 1974).

Moreover, the additional costs imposed by the 1974 Amendments would constitute only a small percentage of the amounts that state and local governments receive in the form of federal grants. Thus, the significance to California of its estimated $34.5 million in additional costs under the 1974 Amendments must be evaluated in light of the fact that California receives 173 times that amount—or $6 billion—in federal subsidies.[5] The total federal contribution to the budgets of state and local governments in fiscal year 1974 was approximately $52 billion.[6] These federal payments include substantial amounts for law enforcement and firefighting activities, which are available, *inter alia,* for training expenses and the payment of salaries. See, *e.g.,* the State and Local Fiscal Assistance Act of 1972, 86 Stat. 919, 31 U.S.C. (Supp. IV)

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[4] This was also true of the costs imposed by the 1966 Amendments which were upheld in *Maryland* v. *Wirtz, supra.*

[5] *1975-76 Governor's Budget Summary,* Schedule 6, pp. B-23 to B-26.

[6] *Special Analyses, Budget of the United States Government, supra,* n. 3, at p. 203.

1221 *et seq.;*[7] the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 197, as amended, 42 U.S.C. 3701 *et seq.;*[8] and the Intergovernmental Personnel Act of 1970, 84 Stat. 1909, as amended, 42 U.S.C. 4701 *et seq.*[9]

Therefore, the cost impact of the 1974 Amendments (which, in absolute terms, is relatively small) would not even remotely impair the effective functioning of the state and local governments.

b. Contrary to appellants' contention (N.L. Br., p. 41), the 1974 Amendments do not "regulate the most intimate, internal and essential governmental function of States and local Governments [by] prescribing terms and conditions of employment of the employees of those Governments" or "usurp" control over a broad range of state and local government policy decisions. The Amendments—in order to accomplish the congressional objectives of maintaining minimum living conditions and of "effect[ing] greater employment by providing a financial disincentive to employers who require overtime hours" (*Dunlop* v. *State of New Jersey,* 522 F. 2d 504, 507 (C.A. 3), petition for writ of certiorari filed October 6, 1975, No. 75-532)—place only minimal restrictions on the authority of state and local governments to set the terms and conditions of employment of their own employees. The Amendments require those governments to pay a living wage; bar them from sex-based wage discrimination, age discrimination and the employment of children in hazardous occupations; and require that covered employees be paid a higher rate for overtime hours, which payment must be in cash and not in compensatory time unless taken within the same pay period (*see Dunlop* v. *State of New Jersey, supra*).

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[7] See Office of Revenue Sharing, U.S. Department of the Treasury, *Payment Summary* 6 (1975).

[8] See Office of Economic Opportunity, the Executive Office of the President, *Fiscal Year 1974 Federal Outlays in Summary.*

[9] See U.S. Civil Service Commission, Bureau of Intergovernmental Personnel Programs, *Grant Awards for Fiscal Year 1974.*

The regulations which the Secretary has issued under the Amendments as 29 C.F.R. Part 553 do not impose any substantive requirements on state and local governments.[10] They do not, as appellants assert, require firefighters to work in four 12-hour shifts (Cal. Br., p. 12) or otherwise establish their hours of work, or their sleep and meal times. They do not prohibit the joint employment by state and local governments of the same individuals or the use of volunteers. They do not require that certain benefits (such as fire mission pay) be denied to employees who do not qualify for the partial overtime exemption applicable to those engaged in fire protection and law enforcement activities. They do not compel state and local

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[10] These regulations do make some minor adjustments in the Act's recordkeeping requirements for those state and local government agencies who take advantage of the partial overtime exemption for employees engaged in fire protection and law enforcement activities. Under the regulations, the records for such employees must be kept on a "work period" basis and must show the work period for each employee. 29 C.F.R. 553.21. The remaining sections of the regulations are simply the Secretary's interpretations of the 1974 Amendments. See *infra*, p. 11.

governments to pay for training time (unless it is required as part of the employees' hours of work, in which event the employees must be paid at least the statutory minima). They do not prohibit police and fire training or "mutual aid" agreements (Cal. Br., pp. 12–14, 19; N.L. Br., pp. 34, 49, 82, 84–85, 120). For a more detailed discussion of this point, see our original brief, pp. 47–53.

The only purpose of these interpretive regulations is to inform public agencies of their obligations under the Act and of their options for minimizing their monetary outlays, such as by adjusting the work schedules of their employees so as to take advantage of the Act's partial overtime exemption for employees engaged in fire protection and law enforcement activities. 29 U.S.C. (Supp. IV) 207(k). The regulations also inform the public agencies about the circumstances under which waiting time, training, joint employment and mutual aid will be treated as hours of work and thus may require overtime premium pay. The Act does not prohibit state and local governments from requiring their employees to work in excess of the hourly limits; it simply requires premium pay if they do. The state or local government may avoid such higher pay by hiring additional employees.[11]

3. In *Fry* v. *United States,* 421 U.S. 542, the Court last Term upheld the constitutionality of the application to state employees of the limitations on wage and

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[11] Among the activities which appellants contend will require considerable overtime (N.L. Br., p. 86) are some that could easily be taught to new employees, such as snow removal.

salary increases imposed by the Economic Stabilization Act of 1970, against similar challenges based on the Commerce Clause and the Tenth Amendment. The Court held that the case was controlled by ***Maryland*** v. *Wirtz, supra* (*id.* at 548). Although distinctions may be drawn between the reach of the statutory provisions involved in ***Fry*** and those in the present case (cf. *ibid.*), the basic rationale of ***Fry*** supports the constitutionality of the 1974 Fair Labor Standards Amendments.

The main argument in ***Fry*** was that "applying the Economic Stabilization Act to state employees interferes with sovereign state functions and for that reason the Commerce Clause should not be read to permit regulation of all state and local governmental employees" (*id.* at 547; footnote omitted). The Court held that the argument was "foreclosed" by ***Maryland*** v. *Wirtz* "where we held that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by a State" (*id.* at 548). It noted that the attack on the statute was framed "in terms of the limitations on [the commerce] power imposed by the Tenth Amendment," which "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system" and concluded that "the wage restriction regulations constituted no such drastic invasion of state sovereignty" (*id.* at 547–548, n. 7).

The 1974 legislation similarly neither "interferes with sovereign state functions" nor "impairs the States' integrity or their ability to function effectively in a federal system." As we explained in our original brief (pp. 5–7, 42–43), the 1974 Amendments merely extended the minimum labor standards upheld in ***Maryland*** v. *Wirtz* (with the addition of the prohibition of age discrimination) to additional categories of state and local government employees. See, also, pp. 9–10, *supra*. Indeed, in one significant respect the coverage of these Amendments is substantially narrower than that of the statute upheld in ***Fry***.

The limitations on wage and salary increases imposed by the Economic Stabilization Act of 1970 applied to virtually all state employees. ***Fry*** v. *United States, supra,* 421 U.S. at 546, n. 6. The 1974 Fair Labor Standards Amendments, however, merely extended the minimum wage and overtime requirements of that Act to an additional 30 percent of all state and local government employees (3.4 million out of 11.4 million). When this additional group of employees is combined with the 2.9 million of such employees who were covered by the statutory provisions upheld in ***Maryland*** v. *Wirtz*, they still constitute only 55 percent of the total state and local government employees (6.3 million out of 11.4 million).[12] Moreover, the Act's minimum wage and overtime requirements do not apply to executive, administrative and professional employees and, like the Act's other provisions, they do not apply to elected state and local government officials or to individuals appointed by such officials to their personal staffs or to policy-making or legal advisory positions (29 U.S.C. (Supp. IV) 203(e)(2)(C), 213(a)(1), 630(b), (c) and (f)).

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[12] Of the 3.4 million employees added by the 1974 Amendments, only 95,000 were paid less than the minimum wage and were thus affected by this particular statutory requirement. See our original brief, pp. 16, 42–43.

Indeed, the federal restrictions upheld in ***Fry*** and those involved in the present case are really opposite sides of the same coin. ***Fry*** involved the validity of limitations on the maximum wages and salaries the states could pay to their employees. The 1974 Amendments involve the minimum amounts the states may pay. Both cases involve federal limitations on a single aspect of state operations: the compensation of its employees through whom it formulates and carries out its policies. In neither case does the federal regulation control the substantive policies or operations of the state.

The Court noted in ***Fry*** that the Economic Stabilization Act was "an emergency measure to counter severe inflation that threatened the national economy" (421 U.S. at 548). That fact, however, merely explains why Congress believed it necessary to exercise its power under the Commerce Clause to stabilize wages and salaries; it does not explain why the legislation was within the scope of that clause. The holding in ***Fry*** that the Economic Stabilization Act was valid under the Commerce Clause and did not violate the Tenth Amendment rested not on the fact that the statute was emergency legislation, but on the fact that it did not constitute an impermissible interference by the federal government with state sovereignty.

As we pointed out in our original brief (pp. 12–13), the same reasoning that led the Court in ***Maryland*** v. ***Wirtz*** to uphold the constitutionality of the Fair Labor Standards Act as applied to employees of state schools and hospitals also supports the constitutionality of the same statute as applied to all state employees. In ***Fry***, the Court held that the validity of the application of the Economic Stabilization Act to "all state and local governmental employees" was established by ***Maryland*** v. ***Wirtz*** (421 U.S. at 548). That decision, as thus interpreted and applied in ***Fry***, also establishes the validity of the application of the Fair Labor Standards Act to all state and municipal government employees.

For the reasons set forth in our original brief and in this supplemental brief, the judgment of the district court should be affirmed.

Respectfully submitted.

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